SMSFR 2008/D2 - Self Managed Superannuation Funds: the application of subsection 66(1) of the Superannuation Industry (Supervision) Act 1993 to contributions of assets to a self managed superannuation fund by a related party of that fund

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Draft Self Managed Superannuation Funds Ruling

Self Managed Superannuation Funds: the application of subsection 66(1) of the *Superannuation Industry (Supervision) Act 1993* to contributions of assets to a self managed superannuation fund by a related party of that fund

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Preamble

This publication is a draft for public comment. It represents the Commissioner's preliminary view about the way in which provisions of the Superannuation Industry (Supervision) Act 1993, or regulations under that Act, apply to superannuation funds that the Commissioner regulates: principally self managed superannuation funds.

Self Managed Superannuation Funds Rulings (whether draft or final) are not legally binding on the Commissioner. However, if the Commissioner later takes the view that the law applies less favourably to you than the final version of this ruling indicates, the fact that you acted in accordance with the final version of this ruling would be a relevant factor in your favour in the Commissioner's exercise of any discretion as to what action to take in response to a breach of that law. The Commissioner may, having regard to all the circumstances, decide that it is appropriate to take no action in response to the breach.

What this Ruling is about

1. This draft Ruling explains how subsection 66(1) of the *Superannuation Industry (Supervision) Act 1993* (SISA)[1] applies to contributions[2] of assets to a self managed superannuation fund (SMSF) by a related party of that fund.

[1] All legislative references in this draft Ruling are to the SISA unless otherwise indicated.
[2] For the purposes of this draft Ruling a contribution is not restricted to something that is a contribution for the purpose of regulation 1.03 of the Superannuation Industry (Supervision) Regulations 1994 (SISR). However, if a contribution is a contribution for the purpose of regulation 1.03 of the SISR, the contribution is subject to the contribution standards in Part 7 of the SISR.

2. Subsection 66(1) prohibits a trustee or investment manager from intentionally acquiring assets from a related party of the SMSF. However, subsections 66(2) and 66(2A) provide for exceptions to this prohibition. If an exception applies to the acquisition of an asset a trustee or an investment manager can acquire the asset from a related party without contravening subsection 66(1). This draft Ruling does not discuss the exceptions in detail.

3. Subsection 66(3) prohibits a person from entering into, commencing to carry out, or carrying out, a scheme to avoid the application of subsection 66(1). This draft Ruling does not discuss the prohibition of avoidance schemes under subsection 66(3).

4. This draft Ruling also does not provide the Commissioner's views on how other SISA and SISR provisions apply to any of the arrangements discussed in this draft Ruling.[3]

Ruling

5. A trustee or investment manager of an SMSF contravenes subsection 66(1) if the trustee or investment manager intentionally acquires an asset from a related party[4] of the SMSF and an exception[5] does not apply to that acquisition.

6. The phrase 'acquire an asset' in subsection 66(1) encompasses the acceptance of a contribution of an asset.

7. For the purposes of section 66, an asset[6] is any form of property and includes money whether Australian currency or currency of another country (foreign currency). However, the phrase 'acquire an asset'[7] does not include accepting money.

8. A trustee or investment manager of an SMSF intentionally acquires an asset from a related party of the SMSF if the trustee or investment manager means to acquire the asset from the related party.[8]

9. Whether it is the trustee and/or the investment manager that acquires an asset is not determined by who acquires legal ownership of the asset as this, as a matter of law, is always the trustee(s) of the SMSF. Rather it is a practical enquiry as to who, in the particular circumstances of the case, can be said to have accepted or obtained the asset for the SMSF.

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[3] Other provisions of the SISA and SISR that complement the prohibition in subsection 66(1) are outlined in paragraph 30 of this draft Ruling.
[4] As defined in subsection 10(1).
[5] Exceptions are provided for under subsection 66(2) or (2A) and are listed at paragraph 35 of this draft Ruling.
[6] As defined in subsection 10(1).
[7] As defined in subsection 66(5).
[8] Subsection 5.2(1), Schedule 1 in the *Criminal Code Act 1995*.

10. Whether the trustee or investment manager means to acquire an asset from a related party is a matter that either requires direct proof (for example, an admission by the trustee or investment manager) or may be established by inferential reasoning.[9] Determining whether an inference that the trustee or investment manager meant to acquire the asset from a related party may be drawn requires consideration of all the facts and circumstances of the particular case. One relevant circumstance would be the trustee or investment manager's awareness of the likelihood that the party from whom the asset is acquired is a related party of the SMSF.[10] The following factors are provided as guidance as to what may be relevant considerations. They are not intended as an exhaustive list. The presence or absence of such factors should not be taken to mean that it is conclusive that a trustee or investment manager did, or did not, intentionally acquire an asset from a related party. The factors include:

- that an SMSF is invariably a small closely held fund such that the trustee or investment manager is likely to know of the relationship between a contributing person or entity and the SMSF;
- whether the trustee or investment manager has had previous dealings with the contributing person or entity; and
- the nature of the asset and whether it is likely to be contributed by an unrelated party of the SMSF. For example, it may be possible to infer that the trustee or investment manager must have been aware that there was no possibility of shares in a closely held family company being contributed by an unrelated entity.

Contributions of money

11. The phrase 'acquire an asset' is defined in subsection 66(5) to not include accepting money. Therefore, a trustee or investment manager does not contravene subsection 66(1) by accepting a contribution of money.

12. Money is a generally accepted medium of exchange for goods, services and other things. It confers complete liquidity on the holder.[11]

13. In the context of subsection 66(1), a contribution of money includes a contribution of cash[12] or a money order, or a contribution by way of electronic funds transfer.

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[9] *R v. Saengsai-Or* (2004) 61 NSWLR 135, at 149.
[10] This is consistent with the NSW Court of Criminal Appeal's approach to inferential reasoning in *R v. Saengsai-Or* (2004) 61 NSWLR 135, at 149.
[11] Encyclopaedic Australian Legal Dictionary, LexisNexis.
[12] Whether Australian currency or foreign currency.

14. A contribution of money also includes a contribution of a cheque or a promissory note that is not a commodity in its own right.[13] The view recognises that the value to the SMSF of a cheque or promissory note that is not a commodity in its own right is in the payment of a sum of money to the SMSF and not as an asset other than money. Although a trustee or investment manager does not contravene subsection 66(1) by accepting a contribution of a promissory note this does not mean that the contribution of a promissory note does not give rise to other compliance issues under the SISA. For example, section 65 may be relevant if contribution of a promissory note gives rise to an amount owing by a member or a relative of a member to the SMSF.

15. A contribution of a promissory note that is traded as a commodity in its own right (that is, it is an object of exchange and not a medium of exchange) is not a contribution of money for the purposes of section 66. For example, a promissory note is a commodity if it is traded on secondary markets or is issued by one entity (the maker) to another entity (the payee or bearer) at a discount from face value with the face value payable to the payee or bearer upon maturity. The acquisition of such a promissory note is an acquisition of an asset other than money.

16. A contribution of collectable bank notes and coins[14] or trade or barter dollars is also not a contribution of money for the purposes of section 66. It is therefore an acquisition of an asset other than money.

Monetary payments to third parties to extinguish a liability of the SMSF

17. If a monetary payment is made by a related party of an SMSF to a third party to extinguish a liability the SMSF has with that third party,[15] this does not result in a contravention of subsection 66(1).

Application of the exceptions

18. Exceptions to the prohibition in subsection 66(1) are provided for in subsections 66(2) and 66(2A).[16]

Acquired at market value

19. For certain of the exceptions to apply to an acquisition of an asset the asset must be 'acquired at market value'.[17] An asset that is contributed to an SMSF is acquired at market value for the purposes of those exceptions if the acquisition of the asset is treated as a contribution equal to the asset's market value.

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[13] It is a separate issue as to when a contribution of a cheque or promissory note is made and is not dealt with in this draft Ruling.
[14] Whether Australian or foreign banknotes or coins.
[15] This is contemplated in Miscellaneous Tax Ruling MT 2005/1 What is the tax treatment of an expense incurred by a superannuation fund that is paid by an employer or eligible person on behalf of a superannuation fund?
[16] See paragraph 35 of this draft Ruling for a summary of the exceptions.
[17] Paragraphs 66(2)(a) and (b) and subsection 66(2A).

20. The Commissioner considers that an excepted asset may also be acquired from a related party of the SMSF if the asset is partly purchased by, and partly contributed to, the SMSF. In these circumstances the sum of the purchase consideration and the amount recorded as the contribution component must be equal to the market value of the asset.[18]

Constitutes an investment

21. If an exception in subsection 66(2A) is to apply to the contribution of an asset by a related party, paragraph 66(2A)(a) requires that the acquisition of the asset 'constitutes an investment'.

22. It is the Commissioner's view that an acquisition of an asset by way of acceptance of a contribution of that asset can constitute an investment for the purposes of satisfying paragraph 66(2A)(a). Therefore, subsection 66(2A) can apply to contributions of assets that are mentioned in subparagraphs 66(2A)(a)(i) to (iv).

23. This means that a trustee or investment manager does not contravene subsection 66(1) by accepting a contribution of such an asset provided it is acquired at market value and, in the case of those assets that are in-house assets under subsection 71(1), the acquisition of the asset does not cause the SMSF to exceed the 5% market value ratio limit for in-house assets.

Contribution of an interest in real property that is held as a tenant in common with a related party

24. Some doubt has been expressed as to the operation of the exception provisions in the case of an asset consisting of an interest in real property that is held as a tenant in common. The law is that the exceptions apply in the normal way to this type of asset. That is, the trustee or investment manager does not contravene subsection 66(1) by accepting a contribution of an interest in real property from a related party, that results in the SMSF and another related party of the SMSF holding the property as tenants in common, if:

- the interest acquired is business real property of the contributing related party; it is acquired by the SMSF at market value and the SMSF has fewer than five members (that is, the exception in paragraph 66(2)(b)) applies); or

[18] This will give an amount for the contribution that is consistent with the amount calculated under section 285-5 of the ITAA 1997 for tax purposes.

- the interest acquired in the property is an in-house asset because it is subject to a lease or lease arrangement between the trustee of the SMSF and a related party,[19] the interest is acquired at market value[20] and the acquisition of the interest does not cause the SMSF to exceed the 5% market value ratio limit for in-house assets[21] (that is, subparagraph 66(2A)(a)(i) applies).

Date of effect

25. It is proposed that when the final Ruling is issued, the Ruling will apply both before and after its date of issue. However, the Ruling will not apply to SMSFs to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the final Ruling.

Funds to which the Ruling applies

26. This draft Ruling applies to SMSFs[22] and former SMSFs.[23] References in the Ruling to SMSFs include former SMSFs unless otherwise indicated.

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[19] That is, it is not excluded from the meaning of in-house asset by paragraph 71(1)(i).
[20] Paragraph 66(2A)(b).
[21] Paragraph 66(2A)(c).
[22] As defined in section 17A.
[23] A former SMSF is a fund that has ceased being a SMSF and has not appointed a registrable superannuation entity (RSE) licensee as trustee – see subsection 10(4).

Appendix 1 – Explanation

This Appendix is provided as information to help you understand how the Commissioner's preliminary view has been reached.

Background

27. Investment rules such as subsection 66(1) support the Government's retirement income policy objectives by ensuring that concessionally taxed superannuation is used only for retirement income purposes and not, for example, as a source of pre-retirement finance for members.

28. The opening comments of Mr Pooley,[24] then Commissioner of the Insurance and Superannuation Commission (ISC),[25] at the Senate Select Committee on Superannuation concerning the introduction of the SIS legislation, provide some insight into the policy intent of the provision:

> Clause 62 [enacted as section 66] of the SIS bill prohibits a trustee or investment manager from intentionally acquiring an asset from a member or relative of a member. There is also an anti-avoidance provision relating to the acquisition of assets through schemes that are designed to stop circumvention of the intent of the provisions. This clause is intended to prohibit members selling their private assets to their fund in order to obtain cash or contributing in specie assets which do not necessarily increase members' retirement income. It should be noted that clause 62 does not preclude cash contributions.
>
> The above transactions are not consistent with the government's aim of giving tax concessions to superannuation to increase retirement income. For example, where a member's or relative's assets is sold to the fund to release cash from the funds this often avoids the intent of the preservation requirements through swapping an illiquid asset outside of the fund, say an investment property or the member's house, for cash in the fund which need not be used for retirement income purposes. The second example is: where a contribution of the member's or relatives in specie asset is made to move an asset into the concessionally taxed superannuation environment, the transaction may not result in an increase in overall retirement income.[26]

[24] Mr Pooley (along with Senator Sherry who appeared on behalf of Treasury) attended the Senate Select Committee as government representatives: see the Chairman's comment to this effect at page 211 of the Senate Select Committee on Superannuation Hansard, Public Hearings Thursday 23 September and Friday 24 September 1993.
[25] Now the Australian Prudential Regulation Authority (APRA).
[26] Senate Select Committee on Superannuation Hansard, Public Hearings Wednesday 22 – Friday 24 September 1993, pp 174-175.

29. Mr Pooley's comments indicate an intention that subsection 66(1) would generally apply to prohibit both the purchase of assets by the fund from a related party[27] and the contribution of assets to the fund by a related party.

30. The prohibition under subsection 66(1) is complemented by other rules in the SISA which apply to dealings with members, their relatives and other related parties of the SMSF. For example:

- a trustee is prohibited from maintaining an SMSF for any purpose other than for the provision of retirement and certain related benefits (referred to as the sole purpose test) – section 62. All of the activities of maintaining an SMSF are subject to this test;[28]
- an SMSF trustee or investment manager is prohibited from lending money, or providing any other financial assistance using the resources of the SMSF, to a member of the SMSF or relative of a member of the SMSF – section 65;[29]
- subject to exceptions in relation to certain derivatives contracts, an SMSF trustee cannot recognise or in any way sanction an assignment of a superannuation interest or a charge over or in relation to a member's benefits or an SMSF asset – regulations 13.12, 13.13 and 13.14 of the SISR;
- subject to specific exceptions, an SMSF trustee is prohibited from borrowing – section 67;
- all SMSF investment dealings must be at arm's length or must be conducted on arm's length terms and conditions – section 109; and
- subject to some transitional provisions and specific exceptions, an SMSF trustee is prohibited from acquiring or maintaining in-house assets[30] that have a total market value in excess of 5% of the total market value of all SMSF assets – Part 8.

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[27] When introduced the provision only prohibited the acquisition of assets from a member of the fund or a relative of a member of the fund. The provision was later amended such that the provision now prohibits the acquisition of assets from a related party (as defined in subsection 10(1)) of the fund.

[28] See SMSFR 2007/D1 Superannuation: the application of the sole purpose test in section 62 of the Superannuation Industry (Supervision) Act 1993 to the provision of benefits other than retirement, employment termination or death benefits.

[29] See SMSFR 2007/D2 Superannuation: giving financial assistance using the resources of a self managed superannuation fund to a member or relative of a member that is prohibited for the purposes of paragraph 65(1)(b) of the *Superannuation Industry (Supervision) Act 1993.*

[30] 'In-house assets' are defined in section 71 and are, subject to specific exceptions, assets that are a loan to or an investment in a related party of the SMSF, or investments in a related trust, or assets that are subject to a lease or lease arrangement with a related party of the SMSF.

Contraventions – audit requirements and consequences

31. SMSF trustees are required to appoint an approved auditor to audit the financial accounts and statements of the SMSF each year.[31] When conducting an audit, the approved auditor is also required to conduct a compliance audit to ensure the SMSF has complied with the SISA and SISR. There is an approved form for notifying the Tax Office of contraventions.[32]

32. Contravention of subsection 66(1) or (3) is an offence punishable on conviction by imprisonment for a term not exceeding one year.[33]

Legislative context

33. Subsection 66(1) provides that:

> Subject to subsection (2), a trustee or an investment manager of a regulated superannuation fund must not intentionally acquire an asset from a related party of the fund.

34. Subsection 66(5) defines the phrase 'acquire an asset' such that it 'does not include accept money'.

35. Subsections 66(2) and (2A) provide for exceptions to the prohibition in subsection 66(1). The prohibition against acquiring assets from a related party of the SMSF does not apply if the asset is:

- listed securities[34] acquired at market value – paragraph 66(2)(a). For example, shares, units, bonds, debentures, rights or options or any other security listed on the Australian Securities Exchange;[35]
- business real property[36] of the related party acquired by an SMSF[37] at market value – paragraph 66(2)(b);
- acquired by an SMSF under a merger between SMSFs – paragraph 66(2)(c);
- acquired by the SMSF pursuant to a written determination issued by the Regulator – paragraph 66(2)(d);[38]

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[31] Section 35C.
[32] Section 129.
[33] Subsection 66(4).
[34] As defined in subsection 66(5).
[35] See paragraphs 92 to 99 of this draft Ruling.
[36] As defined in subsection 66(5).
[37] A former SMSF will not qualify for this exception if it has more than four members.
[38] See Self Managed Superannuation Funds (Assets acquired on Marriage Breakdown) Determination 2006 which issued under paragraph 66(2)(d).

- an in-house asset[39] of the SMSF that is acquired at market value[40] and its acquisition does not result in the level of in-house assets of the SMSF exceeding the 5% market value ratio set out in Part 8[41] – subparagraph 66(2A)(a)(i);
- an asset that is acquired at market value[42] and would be an in-house asset of the SMSF but for the operation of the transitional rules in Subdivision D, Part 8 – subparagraph 66(2A)(a)(ii);
- a life insurance policy issued by a life insurance company that is acquired at market value[43] and that is not contributed by a member, or a relative of a member, of the SMSF – subparagraph 66(2A)(a)(iii). For example, a life insurance policy contributed by a standard employer-sponsor; and
- an asset referred to in paragraphs 71(1)(b), (c), (d), (e), (f), (h) or (j) that is acquired at market value[44] – subparagraph 66(2A)(a)(iv). An example is the contribution of units in a widely held unit trust (see paragraph 71(1)(h)).

36. For the purposes of this draft Ruling a contribution is not restricted to something that is a contribution for the purposes of regulation 1.03 of the SISR. However, if a contribution is a contribution[45] for the purposes of regulation 1.03 of the SISR, the contribution is subject to the contribution standards in Part 7 of the SISR.

Explanation

37. Subsection 66(1) is contravened if a trustee or investment manager of an SMSF intentionally acquires an asset from a related party and an exception[46] does not apply to the acquisition of that asset.

[39] See the meaning of 'in-house asset' in subsection 71(1).
[40] Paragraph 66(2A)(b).
[41] Paragraph 66(2A)(c).
[42] Paragraph 66(2A)(b).
[43] Paragraph 66(2A)(b).
[44] Paragraph 66(2A)(b).
[45] 'Contribution' in relation to a fund includes payment of shortfall components to the fund; and payments to the fund from the Superannuation Holding Accounts Special Account; but does not include benefits that have been rolled over or transferred to the fund.
[46] Subsections 66(2) and (2A). See paragraph 35 of this draft Ruling where the exceptions are listed.

The scope of the phrase 'acquire an asset' and the application of subsection 66(1) to contributions of assets

The meaning of 'acquire'

38. In determining the scope of the term 'acquire' and whether it encompasses contributions of assets it is appropriate to have regard to the context including the mischief that the provision was intended to remedy.[47]

39. In *Lock v. FCT*,[48] Goldberg J attributed 'acquire' with a wide meaning in the context of section 66:

> In the context in which it appears in subss 66(1) and (3), the expression 'acquire' means 'obtain' or 'gain' or 'receive' and 'acquisition' has a corresponding meaning. The expression 'acquire' is a word of common usage and does not have a technical meaning. The Oxford English Dictionary, 2nd ed (1989), defines 'acquire' as meaning:
>
> 1 To gain, obtain, or get as one's own, to gain the ownership of (by one's own exertions or qualities).
>
> 2 To receive or get as one's own (without reference to the manner), to come into possession of.

40. That subsection 66(1) was intended to apply to contributions can also be inferred from the explanation in the Supplementary Explanatory Memorandum (EM),[49] which explains the definition of 'acquire an asset'. The EM explains (emphasis added):

> Clause 62 Acquisition of assets from members of regulated superannuation funds prohibited
>
> Subclause (4) is amended to make it clear that to 'acquire an asset' does not include **accepting contributions** in the form of cash or other money.[50]

41. In the Commissioner's view, taking into account the wide meaning of the term 'acquire' in the context of subsection 66(1), 'acquire an asset' encompasses the trustee or investment manager accepting a contribution of an asset.

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[47] *CIC Insurance Ltd v. Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 per Brennan CJ, Dawson, Toohey and Gummow JJ.
[48] [2003] FCA 309 at [42].
[49] Accompanying the Superannuation Industry (Supervision) Bill 1993 which was enacted as the SISA.
[50] See paragraph 17 of the Supplementary Explanatory Memorandum (EM) Amendments and New Clauses to be Moved on Behalf of the Government accompanying the Superannuation Industry (Supervision) Bill 1993.

42. This view also accords with the explanation given by Mr Pooley at the Senate Select Committee on Superannuation (see extract at paragraph 28 of this draft Ruling), that subsection 66(1) was intended to remedy the mischief of members or relatives[51] contributing assets that did not result in an increase in overall retirement income into the concessionally taxed superannuation environment.

The meaning of 'asset'

43. The term 'asset' is defined in subsection 10(1) to mean 'any form of property' and includes money whether Australian currency or foreign currency. However, the phrase 'acquire an asset' is specifically defined in subsection 66(5) to not include accepting money. Thus leaving aside money, it is necessary to consider what is 'any form of property' in determining whether something is an asset for the purposes of subsection 66(1).[52]

44. In the Commissioner's view it is implicit that asset[53] refers to something of economic value and thus 'any form of property' refers to property that has economic value. This also accords with the meaning that has been ascribed to 'property' being '[a]ny type of right (that is, a claim recognised by law), interest, or thing which is legally capable of ownership, and which has a value…'.[54]

45. Halsbury's Laws of Australia[55] explains 'property' as:

> 'Property' means every species of valuable right and interest including real and personal property, incorporeal hereditaments such as rents and services, rights of way, rights of profit or use in land of another and choses in action, but does not include mere personal licences which are not assignable: *Minister for the Army v. Dalziel* (1944) 68 CLR 261 at 290; [1944] ALR 89; (1944) 17 ALJ 405 per Starke J. 'Property' may denote the right of a person or an object itself: *Pacific Film Laboratories Pty Ltd v. Cmr of Taxation (Cth)* (1970) 121 CLR 154 at 168; 44 ALJR 376 per Windeyer J.

46. In *The Smelting Company of Australia Ltd v. The Commissioners of Inland Revenue*[56] Pollock B described 'property' as a word of 'very general meaning and comprehensiveness'. Similarly in *Jones v. Skinner* Lord Langdale M.R. states:[57]

> …it is well known, that the word 'property' is the most comprehensive of all the terms which can be used, inasmuch as it is indicative and descriptive of every possible interest which the party can have.

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[51] Section 66 was subsequently amended with the effect that it now applies more broadly to prohibit an SMSF acquiring assets from a 'related party'.
[52] Contributions of money are discussed in the next section (paragraphs 49 to 68 of this draft Ruling).
[53] The Encyclopaedic Australian Legal Dictionary (LexisNexis) defines 'asset' as '[a]n item, whether tangible or intangible, having economic value to its owner which, if not already in the form of money, can be converted into money to the owner's benefit'.
[54] Encyclopaedic Australian Legal Dictionary (LexisNexis).
[55] See Note 1 to paragraph [315-1].
[56] [1896] 2 QB 179 at 183.
[57] (1835) 5 LJ Ch 87 at 90.

47. A right or interest is also capable of being property even if the transfer of it can only be accomplished with the consent of some person or authority.[58]

48. It is therefore the Commissioner's view that the phrase 'any form of property' has a very wide meaning and includes every type of right, interest or thing of value that is legally capable of ownership and can be alienated or transferred to an SMSF. The property may be personal or proprietary, legal, equitable or statutory, or tangible or intangible. Examples of things that are assets for the purposes of subsection 66(1) include: an estate or interest in land; a house; a car; a boat; machinery; shares; a chose in action; a mining exploration licence; a mining lease; a rental lease; intellectual property rights.

What is money for the purposes of subsection 66(5)?

49. As the phrase 'acquire an asset' is defined in subsection 66(5) to not include accepting money, a trustee or investment manager does not contravene subsection 66(1) by accepting a contribution of money from a related party. It is therefore necessary to determine whether something contributed is 'money'.

50. The term 'money' is not defined in the SISA. The Encyclopaedic Australian Legal Dictionary (LexisNexis) explains 'money' as follows:

> Any generally accepted medium of exchange for goods, services, and the payment of debts. Examples are coin, banknotes, bills of exchange, promissory notes and claims on bank deposits: for example (NSW) Stamp Duties Act 1920 s 3(1). Money confers complete liquidity on its holder. It serves as a medium of exchange, a measure of value, a standard for deferred payments, a store of value, and a commodity whose worth depends upon its resale value.

51. Case law indicates that the meaning of the term 'money' or 'moneys' depends upon the context in which it appears.[59] The courts have variously stated that money is a medium of exchange and not an object of exchange;[60] and that money can be transferred by media such as electronic transfer.[61]

52. Clearly a trustee or investment manager 'accepts money' if the trustee or investment manager accepts Australian or foreign currency[62] (cash). In the Commissioner's view a trustee or investment manager also accepts money if a money order is accepted or an account held by the SMSF is credited with funds by way of an electronic funds transfer. Therefore, such acquisitions by the trustee or investment manager from a related party do not contravene subsection 66(1).

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[58] *Kelly v. Kelly* (1990) 92 ALR 74 at 78.
[59] *Re Clark and Official Trustee in Bankruptcy* (1998) 50 ALD 291 at 293.
[60] See, for example, *Health Insurance Commission v. Peverill (*1994) 119 ALR 675, at 692 (Dawson J).
[61] *Sykes and Others v. Reserve Bank of Australia* (1997) 151 ALR 579 at 594.
[62] Other than collectable bank notes and coins – see paragraphs 65 and 66 of this draft Ruling.

53. An issue that arises for the purposes of subsection 66(1) is whether a trustee accepts money, or an asset other than money, if the trustee accepts a cheque (including a bank cheque) or a promissory note from a related party. A cheque or a promissory note is a negotiable instrument[63] and, because of its negotiability,[64] is often referred to as being equivalent to cash. A transferee can sue in his or her own name for payment without proof that they gave value although the absence of consideration is a defence.[65]

Cheques

54. A cheque is an unconditional order in writing (signed by the person giving it) that is addressed to a financial institution and requires that financial institution to pay on demand a sum certain in money.[66]

55. Whether a cheque is a personal cheque, a bank cheque, is post-dated or is able to be presented immediately it is the Commissioner's view that the cheque is money for the purposes of section 66. Therefore, its acquisition by a trustee or investment manager does not contravene subsection 66(1).[67]

56. This view recognises that typically a cheque is a medium of exchange and that the value of a cheque to the SMSF is in the payment of a sum of money to the SMSF and not as an asset other than money.

Promissory notes

57. A promissory note is an unconditional promise in writing (and signed) that is made by one party (the maker) to another (the payee or bearer) to pay on demand or at a fixed or determinable future time a sum certain in money.[68]

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[63] An instrument is negotiable if it is recognised as such by statute.

[64] Change in ownership of a cheque or promissory note can be effected by either delivery, or delivery and endorsement, to another person. Similar to cash, a person who delivers a negotiable instrument can pass better title than that person in fact possesses. However, if a cheque is crossed 'not negotiable' and is transferred by negotiation to another person, the other person does not receive, and is not capable of giving, a better title to the cheque than the title that the person who negotiated the cheque to them had. See Ken Robson, 'Riley's Annotated Bills of Exchange Act and Cheques and Payment Orders Act', 4th Edn.

[65] The drawer and each endorser of a cheque is presumed to have received value for the cheque unless the contrary is proved: section 36 of the *Cheques Act 1986*. Further, if value has at any time been given for a cheque, the holder is conclusively presumed to have taken the cheque for value: section 37 of the *Cheques Act 1986*.

[66] As defined in subsection 10(1) of the *Cheques Act 1986*.

[67] It is a separate issue as to when a contribution of a cheque is made and is not dealt with in this draft Ruling.

[68] Subsection 89(1) of the *Bills of Exchange Act 1909*.

58. If a promissory note is an object of exchange rather than a medium of exchange it is not money for the purposes of section 66. A promissory note is an object of exchange if, for example, it is issued at a discount from face value to raise finance and/or is traded at a discount from face value on a secondary market. Further, as value has been given for the promissory note its payment is able to be enforced. The acquisition of such a promissory note by the trustee or investment manager is the acquisition of an asset other than money and contravenes subsection 66(1) unless an exception[69] applies.

Example 1 – Promissory note that is an object of exchange

59. *Ben is a member and trustee of the BFG SMSF. Ben acquires promissory notes that are traded at a discount from face value on a secondary market. The notes mature in six months at which time the maker is required to pay Ben the face value of the notes.*

60. *Ben endorses and delivers the notes to the SMSF. The promissory notes are an object of exchange rather than a medium of exchange. Further, as value has been given by Ben for the notes the SMSF is able to enforce payment.*[70] *The promissory notes are therefore assets other than money. Ben acquires the assets in his role as trustee of the BFG SMSF. Ben as trustee of the BFG SMSF therefore contravenes subsection 66(1)*.

61. If a promissory note is issued to the SMSF by the maker (for example a member of the SMSF) for no consideration and the note is payable at face value at a certain future date or on demand it is the Commissioner's view that the promissory note is money for the purposes of section 66. Therefore, its acquisition by a trustee or investment manager does not contravene subsection 66(1).[71] However, this does not mean that the contribution of a promissory note does not give rise to other compliance issues under the SISA. For example, section 65 may be relevant if contribution of a promissory note gives rise to an amount owing by a member or a relative of a member to the SMSF.

62. As with cheques this view recognises that the value of the promissory note to the SMSF is in the payment of a sum of money and not as an asset other than money.

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[69] See subsection 66(2) or (2A).

[70] Where value has at any time been given for a bill, the holder is deemed to be a holder for value as regards the acceptor and all parties to the bill who became parties prior to such time: section 32 of the *Bills of Exchange Act 1909*.

[71] It is a separate issue as to when a contribution of a promissory note is made and is not dealt with in this draft Ruling.

Example 2 – Promissory note as a medium of exchange

63. *Linda is a member and trustee of the LN SMSF. Linda (as maker) issues a promissory note to the SMSF (payee) that is payable at face value at a specified future date. The SMSF does not provide any consideration to Linda for the promissory note.*

64. *The promissory note is a medium of exchange and is not in this case an object of exchange. Linda acquires the promissory note in her role as trustee of the LN SMSF. Linda as trustee of the LN SMSF does not contravene subsection 66(1) by acquiring the promissory note*.

Collectible banknotes and coins

65. There is a distinction between 'money' used as legal tender, whether Australian currency or foreign currency, and 'money' that has a value greater than its face value, such as collectible banknotes and coins.[72] It is the Commissioner's view that collectible banknotes and coins are 'commodities' rather than 'money' in its usual sense.

66. Therefore, the acquisition of collectible banknotes and coins by a trustee or investment manager from a related party of the SMSF is prohibited by subsection 66(1).

Trade dollars or barter credits

67. The Commissioner does not consider trade dollars or barter credits to be 'money' for the purposes of subsection 66(5). Trade dollars or barter credits can generally only be exchanged for goods and services. As such, they are not unconditional, nor convertible to cash, and have no assigned monetary value. They are not a negotiable instrument such as a cheque. In addition, credit units arising from barter and counter trade transactions are not acceptable forms of payment for parties external to the bartering arrangements.

68. Therefore, the acquisition of trade dollars or barter credits by a trustee or investment manager from a related party of the SMSF is prohibited by subsection 66(1).

[72] See, for example, *Moss v. Hancock* [1899] 2 QB 111, per Darling J at 116; *Cusack v. Federal Commissioner of Taxation* [2002] FCA 1012; 2002 ATC 4676; 50 ATR 443.

Monetary payments to third parties to extinguish a liability of the SMSF

69. A monetary payment may be made by a related party of an SMSF to a third party to extinguish a liability the SMSF has with that third party.[73] This does not result in contravention of subsection 66(1). Although the monetary payment of a debt owed by the SMSF confers a financial or monetary advantage on the SMSF it does not result in an acquisition of an asset by the SMSF.[74]

70. Even if the monetary payment could be regarded as acquired because it was constructively received by the SMSF, it is the acquisition of a monetary payment and therefore would not in any case contravene subsection 66(1).

Subsection 66(1) applies only if the trustee or investment manager intentionally acquires an asset from a related party

71. Subsection 66(1) expressly refers to intention in that it states that a trustee or investment manager must not *intentionally* acquire an asset from a related party.

72. Subsection 66(4) makes a contravention of subsection 66(1) (and also subsection 66(3)) an offence for which the person is punishable on conviction by imprisonment for up to one year. Section 9A provides that Chapter 2 (except for Part 2.5) of the *Criminal Code*[75] applies to all offences against the SISA.

73. An offence consists of physical and fault elements.[76] An offence may comprise more than one physical element and each physical element may have a different fault element.[77] If a person is to be found guilty of committing an offence it is necessary to prove each physical element of the offence together with the fault element that is applicable to each physical element.[78] For a physical element for which no fault element is specified the *Criminal Code* sets out default fault elements. If the physical element is conduct the default fault element is intention whereas if the physical element consists of a circumstance or a result the default fault element is recklessness.[79]

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[73] This is contemplated in Miscellaneous Tax Ruling MT 2005/1 What is the tax treatment of an expense incurred by a superannuation fund that is paid by an employer or eligible person on behalf of a superannuation fund?
[74] *Health Insurance Commission v. Peverill* (1994) 119 ALR 675, at 691; *Mutual Pools Pty Ltd and Staff Pty Ltd v. Commonwealth of Australia* (1994) 119 ALR 577, at 605-6.
[75] See Schedule 1 in the *Criminal Code Act 1995*.
[76] Subsection 3.1(1) of the *Criminal Code*.
[77] Subsection 3.1(3) of the *Criminal Code*.
[78] Section 3.2 of the *Criminal Code*.
[79] Section 5.6 of the *Criminal Code*.

74. Although subsection 66(1) specifies intention as a fault element it is necessary to determine the physical element(s) of the offence. The physical element of an offence may be conduct; a result of conduct or a circumstance in which conduct, or a result of conduct, occurs. The term 'conduct' means 'an act, an omission to perform an act or a state of affairs' and to 'engage in conduct' means '(a) do an act; or (b) omit to perform an act'. However, 'act' is not defined.[80]

75. The issue that arises for the purposes of subsection 66(1) is whether the physical elements consist of the conduct of acquiring an asset and the circumstance that the asset is acquired from a related party or whether the physical element is the conduct of acquiring an asset from a related party. Under the former view the fault element relevant to the acquisition of the asset is intention (as specified in subsection 66(1)) whereas for the circumstance an issue arises as to whether it is intention as specified in subsection 66(1) or, recklessness on the basis that no fault element is specified.

76. In the Commissioner's view, the physical element is the conduct of acquiring an asset from a related party and therefore the relevant fault element is intention (as specified in subsection 66(1)).[81] It is therefore necessary to establish whether it is the trustee and/or the investment manager that acquires the asset from the related party and whether that person meant to acquire the asset from the related party.[82]

77. Whether it is the trustee and/or the investment manager that acquires an asset is not determined by who acquires legal ownership of the asset as this, as a matter of law, is always the trustee(s) of the SMSF. Rather it is a practical enquiry as to who, in the particular circumstances of the case, can be said to have accepted or obtained the asset for the SMSF.

[80] Section 4.1 of the *Criminal Code*.
[81] In reaching this view consideration was given to the approach of the court in determining the physical element(s) of subsection 233B(1) (since repealed) of the *Customs Act 1901* in *R v. Saengsai-Or* (2004) 61 NSWLR 135 and the approach of Brennan J to that provision (at 493-4) in *He Kaw Teh v. R* (1985) 60 ALR 449.
[82] A person has intention with respect to conduct if he or she means to engage in that conduct: subsection 5.2(1) of the *Criminal Code*.

78. Whether the trustee or investment manager means to acquire an asset from a related party is a matter that either requires direct proof (for example, an admission by the trustee or investment manager) or may be established by inferential reasoning.[83] Determining whether an inference that the trustee or investment manager meant to acquire the asset from a related party may be drawn requires consideration of all the facts and circumstances of the particular case. One relevant circumstance would be the trustee or investment manager's awareness of the likelihood that the party from whom the asset is acquired is a related party of the SMSF.[84] The following factors are provided as guidance as to what may be relevant considerations. They are not intended as an exhaustive list. The presence or absence of such factors should not be taken to mean that it is conclusive that a trustee or investment manager did, or did not, intentionally acquire an asset from a related party. The factors include:

- that an SMSF is invariably a small closely held fund such that the trustee or investment manager is likely to know of the relationship between a contributing person or entity and the SMSF;
- whether the trustee or investment manager has had previous dealings with the contributing person or entity; and
- the nature of the asset and whether it is likely to be contributed by an unrelated party of the SMSF. For example, it may be possible to infer that the trustee or investment manager must have been aware that there was no possibility of shares in a closely held family company being contributed by an unrelated entity.

A related party of the SMSF

79. Subsection 66(1) is contravened if a trustee or investment manager intentionally acquires an asset by way of contribution from a related party of the SMSF. It does not matter if the asset is acquired for the benefit of the contributor as a member of the SMSF or is acquired for the benefit of some other member of the SMSF.

80. However, if a trustee or investment manager acquires an asset by way of contribution from a non-related party subsection 66(1) is not contravened even though the acquisition is made for the benefit of a member.[85]

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[83] *R v. Saengsai-Or* (2004) 61 NSWLR 135, at 149.

[84] This is consistent with the NSW Court of Criminal Appeal's approach to inferential reasoning in *R v. Saengsai-Or* (2004) 61 NSWLR 135, at 149.

[85] However, subsection 66(3) prohibits any person from participating in a scheme with the intention of avoiding the application of subsection 66(1). Whether there is a 'scheme' in contravention of subsection 66(3) is to be considered having regard to all the circumstances surrounding the transactions as a whole: *Lock v. FCT* [2003] FCA 309 at [74]-[75].

81. It is therefore necessary to determine if an asset is acquired from a related party of the SMSF. A 'related party' of a superannuation fund is defined in subsection 10(1) to mean:

- a member of the SMSF;
- a standard employer-sponsor of the SMSF; or
- a Part 8 associate of either a member or standard employer-sponsor.

Standard employer-sponsor of an SMSF

82. A standard employer sponsor of an SMSF is an employer who contributes to an SMSF for the benefit of a member, under an arrangement between the employer and the trustee of the SMSF. It does not include an employer who contributes to the SMSF only under an arrangement with the employee/member.[86]

Part 8 associate of a member or a standard employer-sponsor

83. The definition of 'Part 8 associate' is given in Subdivision B of Division 1 of Part 8. The term is defined with reference to individuals, companies, and partnerships in sections 70B, 70C and 70D respectively.

Application of the exceptions

84. Certain assets can be intentionally acquired by the trustee or investment manager from a related party of the SMSF without contravening subsection 66(1). Subsection 66(1) does not apply to the acquisition of an asset if an exception in either subsection 66(2) or (2A) is satisfied.[87]

85. As the exceptions in paragraphs 66(2)(a) and (b) and subsection 66(2A) require that the asset is acquired at market value and subsection 66(2A) also requires that the acquisition of the asset constitutes an investment an issue arises as to whether these exceptions can apply to contributions of assets.

86. Taking into account the Government's retirement income policy and the mischief that subsection 66(1) is intended to remedy, [88] it would be anomalous if a related party of the SMSF could sell an asset specified in the exception to the SMSF without contravening subsection 66(1) but could not contribute that asset to the SMSF. It is therefore the Commissioner's view that these exceptions can apply to the contribution of an asset.

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[86] Subsection 16(2).
[87] See paragraph 35 of this draft Ruling where the exceptions are listed.
[88] See paragraph 28 of this draft Ruling and the mischief that subsection 66(1) was intended to remedy as explained by Mr Pooley then Commissioner of the Insurance and Superannuation Commission (ISC), at the Senate Select Committee on Superannuation public hearings on the introduction of the SIS legislation.

Contributions 'acquired at market value'

87. For the exceptions in paragraphs 66(2)(a) and (b) and in subsection 66(2A) to apply to the acquisition of assets, it is a requirement that the specified assets are acquired at market value.

88. In relation to an asset 'market value' is defined in subsection 10(1) to mean:

> …the amount that a willing buyer of the asset could reasonably be expected to pay to acquire the asset from a willing seller if the following assumptions were made:
>
> (a) that the buyer and the seller dealt with each other at arm's length in relation to the sale;
>
> (b) that the sale occurred after proper marketing of the asset;
>
> (c) that the buyer and the seller acted knowledgeably and prudentially in relation to the sale.

89. Requiring the asset to be acquired at market value ensures that an excepted asset cannot be purchased by an SMSF for an amount greater than its market value as a means of extracting cash from the SMSF.[89] In the case of a contribution, the market value requirement ensures that a member's account correctly reflects the value of the contribution.

90. Therefore, if an asset is contributed to the SMSF by a related party the Commissioner considers that the 'acquired at market value' requirement is satisfied if the acquisition of the asset is treated as a contribution equal to the market value of the asset.

91. The Commissioner considers that an excepted asset may also be partly purchased by, and partly contributed to, the SMSF by a related party. In these circumstances the sum of the purchase consideration and the amount recorded as the contribution component must be equal to the market value of the asset.[90]

Listed securities – paragraph 66(2)(a)

92. Subsection 66(5) defines 'listed security' as a security listed for quotation in the official list of:

> (a) a licensed market within the meaning of section 761A of the *Corporations Act 2001* (*Corporations Act*);
>
> (b) an approved stock exchange within the meaning of section 470 of the *Income Tax Assessment Act 1936* (ITAA 1936); or
>
> (c) a market exempted under section 791C of the *Corporations Act*.

---

[89] Paragraph 65(1)(b) and section 109 may also apply to such a transaction.
[90] This will give an amount for the contribution that is consistent with the amount calculated under section 285-5 of the ITAA 1997 for tax purposes.

93. The Encyclopaedic Australian Legal Dictionary (LexisNexis) describes a 'security' as:

> A document issued by a government, semi-government body, statutory body, or public company in return for funds invested for a specified purpose by purchasers. Such securities are marketable. They include bonds, debentures, shares, units and interests in managed investment schemes…

A licenced market or a market exempted from the licensing requirement

94. Section 761A of the *Corporations Act* defines a 'licensed market' to mean:

> a financial market the operation of which is authorised by an Australian market licence.

95. The meaning of a 'financial market' is set out in section 767A of the *Corporations Act* and broadly is a facility through which transactions involving financial products, including securities, are made. Under section 791A of the *Corporations Act* there is a general requirement for such facilities to be the holder of an Australian market licence to operate legally as a financial market in Australia unless exempted under section 791C[91] of the *Corporations Act* from the licensing requirement. An example of a holder of an Australian market licence is ASX Limited (formerly Australian Stock Exchange Limited and now operating under the brand Australian Securities Exchange).

96. Therefore, examples of listed securities for the purposes of paragraph 66(2)(a) include shares, bonds, debentures, units and interests in managed investment schemes that are listed on the Australian Securities Exchange.

An approved stock exchange

97. To determine whether a stock exchange is an approved stock exchange for the purposes of section 470 of the ITAA 1936 it is necessary to refer to Regulation 152I of the Income Tax Regulations 1936 and consequently Schedule 12 to the Regulations which lists approved stock exchanges for the purposes of section 470 of the ITAA 1936. Accordingly, an 'approved stock exchange' for the purpose of section 470 of the ITAA 1936 includes domestic stock exchanges such as the ASX Limited, the Bendigo Stock Exchange Limited and the Stock Exchange of Newcastle Limited and also stock exchanges from many other countries, for example, the New York Stock Exchange and the London Stock Exchange.

[91] See the 'Register of entities under the Corporations (Low Volume Financial Markets) Exemption Notice 2003' available at www.asic.gov.au.

Example 3 – In-specie contribution of listed shares

98. *Nadia, a member of Aidan SMSF, owns shares listed on the ASX. Nadia wants to transfer these shares to the SMSF as a contribution. The shares held by Nadia are a listed security as defined in subsection 66(5).*

99. *The trustee or investment manager of the Aidan SMSF can accept a contribution of Nadia's shares without contravening subsection 66(1) if the shares are treated as a contribution equal to the market value of those shares: paragraph 66(2)(a).*

The requirement in paragraph 66(2A)(a) that the acquisition of an asset 'constitutes an investment'

100. Paragraph 66(2A)(a) provides that subsection 66(1) does not prohibit the acquisition of an asset from a related party of the SMSF if the acquisition of the asset 'constitutes an investment' that is either an in-house asset within the meaning of subsection 71(1) or is excluded from being an in-house asset under certain paragraphs of subsection 71(1) or under certain transitional provisions.

Contribution of an in-house asset

101. It is the Commissioner's view that an acquisition of an asset by way of acceptance of a contribution of that asset can 'constitute an investment' for the purposes of satisfying paragraph 66(2A)(a). This follows from the interaction of subsections 66(2A) and 71(1). For example, if a member of an SMSF contributes shares held in a related company of the SMSF, those shares upon acquisition are an investment in a related party and are therefore in-house assets of the SMSF under subsection 71(1). It therefore follows for the purposes of subparagraph 66(2A)(a)(i) that upon contribution of the shares there is an acquisition of an asset that constitutes an investment that is an in-house asset of the SMSF within the meaning of subsection 71(1).

102. Subsection 66(1) does not apply to prohibit the contribution if the in-house asset is acquired at market value[92] (see paragraphs 87 to 91 of this draft Ruling) and the acquisition of the shares does not result in the SMSF's in-house assets exceeding the 5% market value ratio of in-house assets.[93]

[92] Paragraph 66(2A)(b).
[93] Paragraph 66(2A)(c).

Contribution of an asset that is excluded from being an in-house asset under paragraphs 71(1)(b), (c), (d), (e), (f), (h) or (j)

103. If a related party makes a contribution of an asset that is specifically excluded from being an in-house asset of the SMSF under certain paragraphs of subsection 71(1), that asset upon contribution similarly constitutes an investment of the SMSF. For example, if a trustee or investment manager accepts a contribution of units in a widely held unit trust this is an investment in a widely held unit trust for the purposes of paragraph 71(1)(h). It therefore follows for the purposes of subparagraph 66(2A)(a)(iv) that upon contribution of the units there is an acquisition of an asset that constitutes an investment that is referred to in paragraph 71(1)(h).

104. Subsection 66(1) does not apply to prohibit the contribution of an asset mentioned in paragraph 71(1)(b), (c), (d), (e), (f), (h) or (j) if the asset is acquired at market value[94] (see paragraphs 87 to 91 of this draft Ruling).

105. As assets mentioned in paragraphs 71(1)(b), (c), (d), (e), (f), (h) and (j) are not in-house assets the acquisition of such assets cannot cause an SMSF to exceed the 5% permitted level of in-house assets. It therefore follows that paragraph 66(2A)(c) is satisfied with respect to the acquisition of such assets.

Contribution of an interest in real property that is held as a tenant in common with a related party

106. Some doubt has been expressed as to the operation of the exception provisions in the case of an asset consisting of an interest in real property that is held as a tenant in common. The law is that the exceptions apply in the normal way to this kind of asset. That is, the trustee or investment manager does not contravene subsection 66(1) by accepting a contribution of an interest in real property from a related party, that results in the SMSF and another related party of the SMSF holding the property as tenants in common, if an exception applies to the asset.

107. A trustee or investment manager can accept a contribution of an interest in real property without contravening subsection 66(1)[95] if:

- the interest acquired is business real property of the contributing related party;
- the interest is acquired by the SMSF at market value; and
- the SMSF has fewer than five members.

[94] Paragraph 66(2A)(b).
[95] See the exception under paragraph 66(2)(b).

108. A trustee or investment manager can also accept a contribution of an interest in real property without contravening subsection 66(1)[96] if:

- the interest acquired in the property is an in-house asset because it is subject to a lease or a lease arrangement between the trustee of the SMSF and a related party;[97]
- the interest is acquired by the SMSF at market value;[98] and
- the acquisition of the interest does not cause the SMSF to exceed the 5% market value ratio limit for in-house assets.[99]

109. It may perhaps have been thought that the absence of a reference to paragraph 71(1)(i) in subparagraph 66(2A)(a)(iv) implies that the exceptions to section 66 do not apply at all to an asset consisting of an interest held as a tenant in common. The Commissioner does not take that view; the exceptions still apply if the acquisition satisfies the terms of the exceptions in another way.

110. However, if the interest acquired in real property is not an interest in business real property of the contributing related party and is not an in-house asset under subsection 71(1), a trustee or investment manager contravenes subsection 66(1) by accepting a contribution of the interest as there are no other exceptions that are relevant.

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[96] See the exception under subparagraph 66(2A)(a)(i).
[97] That is, it is not excluded from the meaning of in-house asset by paragraph 71(1)(i).
[98] Paragraph 66(2A)(b).
[99] Paragraph 66(2A)(c).

Appendix 2 – Your comments

111. We invite you to comment on this draft Superannuation Regulator's Ruling. Please forward your comments to the contact officer by the due date. (Note: the Tax Office prepares a compendium of comments for the consideration of the relevant Rulings Panel. The Tax Office may use a sanitised version (names and identifying information removed) of the compendium in providing its responses to persons providing comments. Please advise if you do not want your comments included in a sanitised compendium.)

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Appendix 4 – Detailed contents list

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

MT 2005/1; SMSFR 2007/D1; SMSFR 2007/D2

Subject references:

- acquire an asset
- former SMSF
- intention
- related party
- superannuation

Legislative references:

- Bills of Exchange Act 1909 32
- Bills of Exchange Act 1909 89
- Cheques Act 1986 10(1)
- Cheques Act 1986 36
- Cheques Act 1986 37
- Corporations Act 761A
- Corporations Act 767A
- Corporations Act 791A
- Corporations Act 791C
- Criminal Code Act 1995 Sch 1
- Criminal Code Act 1995 Ch 2
- Criminal Code Act 1995 3.1(1)
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- Criminal Code Act 1995 3.2
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- Criminal Code Act 1995 5.6
- ITAA 1936 470
- ITAA 1997 285-5
- Income Tax Regulations 1936 Reg 152I
- Income Tax Regulations 1936 Sch 12
- SISA 9A
- SISA 10(1)
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- SISA 109
- SISA 129
- SISR Reg 1.03
- SISR Reg 13.12
- SISR Reg 13.13
- SISR Reg 13.14
- SISR Pt 7
- Stamp Duties Act 1920 (NSW) 3(1)

Case references:

- CIC Insurance Ltd v. Bankstown Football Club Ltd (1997) 187 CLR 384
- Cusack v. Federal Commissioner of Taxation [2002] FCA 1012; 2002 ATC 4676; 50 ATR 443
- Health Insurance Commission v. Peverill (1994) 119 ALR 675; 179 CLR 226
- He Kaw Teh v. R (1985) 60 ALR 449; 157 CLR 523
- Jones v. Skinner (1835) 5 LJ Ch 87

- Kelly v. Kelly (1990) 92 ALR 74; 64 ALJR 234
- Lock v. FCT [2003] FCA 309; 52 ATR 575
- Minister for the Army v. Dalziel (1944) 68 CLR 261; [1944] ALR 89; (1944) 17 ALJ 405
- Moss v. Hancock [1899] 2 QB 111
- Mutual Pools Pty Ltd and Staff Pty Ltd v. Commonwealth of Australia (1994) 119 ALR 577; 94 ATC 4103; 27 ATR 357; 179 CLR 155
- Pacific Film Laboratories Pty Ltd v. Commissioner of Taxation (Cth) (1970) 121 CLR 154; 44 ALJR 376; 70 ATC 4104; 1 ATR 771
- R v. Saengsai-Or (2004) 61 NSWLR 135; 185 FLR 336; [2004] NSWCCA 108
- The Smelting Company of Australia Ltd v. IR Commrs [1896] 2 QB 179
- Re Clark and Official Trustee in Bankruptcy (1998) 50 ALD 291
- Sykes and Others v. Reserve Bank of Australia (1997) 151 ALR 579

Other references:

- LexisNexis Encyclopaedic Australian Legal Dictionary http://www.lexisnexis.com/au/legal.
- Halsbury's Laws of Australia, LexisNexis.
- Ken Robson, 'Riley's Annotated Bills of Exchange Act and Cheques and Payment Orders Act', 4th Edn.
- Oxford English Dictionary, 2nd ed., 1989, Clarendon Press.
- Self-managed Superannuation Funds (Assets Acquired on Marriage Breakdown) Determination 2006.
- Senate Select Committee on Superannuation Hansard, Public Hearings Wednesday 22 – Friday 24 September 1993.
- Supplementary Explanatory Memorandum to the Superannuation Industry (Supervision) Bill 1993.

ATO references

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